90-1272

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TRUMAN E. BULLARD -
PETITIONER

vs.

CLAYTON YEUTTER, SECRETARY
U. S. DEPARTMENT OF AGRICULTURE -
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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80-1272

QUESTION(S) PRESENTED

Whether an Agency's interpretation(s) of the statutes under which it promulgates regulations, the regulations promulgated by that Agency, and guidance of that Agency is entitled to deference by the courts?

Whether the 30-day time limit in 42 U.S. Code Section 2000e-16(c) is an absolute jurisdictional bar to filing suit or is it subject to "equitable tolling" where petitioner relied on the Equal Employment Opportunity Commission's (EEOC) interpretations of 29 Code of Federal Regulations (CFR) Section 1613.235 that the reply to a request to reopen is the final decision for purposes of filing civil action where the request to reopen was filed within the 30-day time limit?

Whether when there exist a genuine issue of material fact, can a court issue a defendant relief by summary judgement as a matter of law? Did the lower courts err in not addressing and affirming the issue of disputed genuine material fact in granting a motion for summary judgement?

Whether the lower courts erred in dismissing and affirming this multiple issue case on only the one issue of discrimination and without addressing the Veterans Preference and nepotism issues?

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NO. _____

IN THE SUPREME COURT

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TRUMAN E. BULLARD -
PETITIONER

vs.

CLAYTON YEUTTER, SECRETARY
U. S. DEPARTMENT OF AGRICULTURE -
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Truman E. Bullard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit to affirm the order of the United States District Court, Eastern District of North Carolina, Fayetteville Division granting

defendant's motion for summary judgment to dismiss the suit based upon plaintiff's filing a request to reopen prior to filing in court.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals No. 89-2787 appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Eastern District of North Carolina, Fayetteville Division appears in Appendix B to this Petition. The unpublished denial of the Petitioner's Petition for Rehearing appears at Appendix C to this Petition. The unpublished written dismissal by the Equal Employment Opportunity Commission (EEOC) based on a rebuttable presumption that the final agency decision was received five days after the date of the decision, appeal no. 018841135, is dated September 25, 1985. The written granting of

the first request to reopen by the EEOC, request no. 05860007, is dated July 28, 1987. The written denial of the second request to reopen by the EEOC, request no. 05870569, is dated May 6, 1988.

JURISDICTION

The Court of Appeals' Opinion in this matter was decided on September 28, 1990. A timely Petition for Rehearing was filed on October 11, 1990. The Court of Appeals' denial of the Petition for Rehearing was issued on October 22, 1990 and is set forth in Appendix C. This Court's jurisdiction is invoked under 28 U.S. Code Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S. Code Section 2000e-16(c) (Federal employment discrimination); 28 U.S. Code Section 1331 (Nepotism); 5 U.S. Code Section

3309 (Veterans Preference); 38 U.S. Code Section 2011 (Vietnam-Era Veterans Preference); 29 U.S. Code Section(s) 791, 793 and 794 (Non-Federal employment Handicap Discrimination, the Rehabilitation Act); 29 Code of Federal Regulations (CFR) Section(s) 1601.28(b) and (e); 1601.29; 1613.233(c); 1613.234; 1613.235; 1613.281; and 1613.282.

STATEMENT OF THE CASE

The United States District Court, Eastern District of North Carolina, Fayetteville Division, had jurisdiction of the discrimination issue pursuant to 42 U.S. Code Section 2000e-16(c) (Federal employment) or 29 U.S. Code Section 791, 793 and 794 (Non-Federal employment) contingent upon a determination as to the Department of Agriculture's claim that the position at issue was not a Federal position. The Court had jurisdiction of the Veterans Preference claims pursuant to 5 U.S.

Code Section 3309 and 38 U.S. Code Section 2011. The Court had jurisdiction of the nepotism claim pursuant to 28 U.S. Code Section 1331.

On July 22, 1977 petitioner applied for a position in the County Executive Director Training Program with the Agriculture Stabilization and Conservation Service (ASCS), U. S. Department of Agriculture (USDA).

Petitioner interviewed for the position in October 1977.

On November 11, 1977 six applicants including several who did not meet the screenout qualifications and several relatives of the selecting officials were selected. No applicant other than the petitioner submitted evidence of Veterans Preference. Petitioner is a 30 per cent or more disabled Veteran.

Beginning the week after November 11, 1977 the petitioner made several attempts to ascertain the name and address of the EEO counselor from the State Director of the ASCS, Mr. Clarence P. Stewart. Petitioner filed a

complaint with Stewart by letter dated December 19, 1977.

On January 8, 1978 five more applicants, again excluding petitioner, were selected.

On January 10, 1979 petitioner was provided the name and address of the EEO counselor.

On January 23, 1979 petitioner contacted an EEO counselor with his complaint of handicap discrimination and violation of Veterans Preference. The nepotism became evident during the investigation of the discrimination.

On February 23. 1979 petitioner had his final interview with the EEO counselor.

On March 1, 1979 petitioner filed a formal complaint with USDA.

A final USDA decision was rendered on February 2, 1984.

Petitioner appealed to EEOC Office of Review and Appeal (ORA) on February 28, 1984.

On September 25, 1985 EEOC ORA issued the dismissal based on a rebuttable presumption of

untimeliness.

Petitioner requested reopening on October 11, 1985.

Request to reopen was granted by EEOC on July 28, 1987. The EEOC specifically stated that this was the final decision on the issue of timeliness but the merits of the complaint were subject to further discretionary appeal to the EEOC.

Petitioner filed a second request to reopen on the merits August 28, 1987.

The EEOC issued its final action to deny the second request to reopen on May 6, 1988. The final EEOC action was received by the petitioner on May 19, 1988.

On June 17, 1988 the petitioner filed his civil action.

On April 21, 1989 the defendant filed a motion to dismiss or, in the alternative, for summary judgment.

On July 11, 1989 the District Court granted defendant's motion for summary judgement and dismissed the suit.

Petitioner filed notice of appeal to the Fourth Circuit on September 7, 1990. The appeal was denied on September 28, 1990. A request for rehearing was denied on October 22, 1990.

The petitioner argued before the Eastern District of North Carolina and the Fourth Circuit that the petitioner's actions of continued pursuit of his complaint through the administrative process by requesting reopening in accordance with EEOC's interpretation of the statute(s) and the EEOC's interpretations of its own regulations which once invoked, barred the petitioner from filing in court based on not exhausting the administrative remedies, preserved the petitioner's right to file in court after the EEOC's final action as determined by the EEOC.

The petitioner argued before the Courts that even if the issue of whether or not the position in question in this case at bar were decided in favor of the position being a

Federal position, the petitioner would be entitled to "equitable tolling" of the 30-day time limit for filing the civil action based on the petitioner's reliance on the EEOC's interpretation of its regulation, 29 CFR 1613.235, that a reply to a request to reopen was the EEOC's "final action" for the purpose of filing a civil action under 42 U.S. Code (USC) Section 2000e-16(c).

The petitioner argued before the Courts that summary judgment could not be granted the defendant as a matter of law because of the undecided genuine issue of material fact as to whether or not the position was a Federal position. The USDA maintained throughout the EEOC process that the position was not a Federal position. Mr. R. W. Wilkerson, Jr., (one of the selecting officials) states in his sworn affidavit in the Report of Investigation, File Number At-303-88, December 5, 1979:

> "... In Bullard's case, no special consideration was given for the fact that he was a Veteran, or that he was disabled. The reason he was not given special consideration, is because the

> position for which he was making application, was the CEDT position, which is not federal employment...."

The issue of whether or not the position is a Federal position or a Non-Federal (private sector) position governs the type and content of the required right-to-sue notice from EEOC. Non-Federal right-to-sue notices are governed by 29 CFR 1601.28(e) and 1613.29 whereas Federal right-to-sue notices are governed by 29 CFR 1613.281 and 1613.282. The contents of these two notices are very different, most notable is the difference in the 90-day versus the 30-day periods in which to file a claim. If the USDA is correct that the position is not a Federal position, then the petitioner has not yet received the proper right-to-sue notice. However, the petitioner would still be properly in court under the 180-day rule with no "final action" by the EEOC. Hence, the petitioner would not be subject to the regulation relied upon by the Courts to dismiss his case.

The petitioner argued before the Courts

that even if the discrimination claims were properly denied by the Courts that the Courts must still resolve the Veterans Preference and nepotism issues included in the complaint.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents issues not resolved by lower Courts which were required to be resolved as a matter of law which have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and the Order by the District Court affirmed by the Fourth Circuit by omission of the issue of "equitable tolling" conflicts with the this Court and the Sixth, Tenth, Eleventh, and District of Columbia Circuits.

In promulgating regulations to implement Title VII (Civil Rights Act), the Civil Service Commission (now the Office of Personnel Management), which has been superseded by the

Equal Employment Opportunity Commission (EEOC) in Title VII matters by the Civil Service Reform Act, the Agency promulgated 29 Code of Federal Regulations (CFR) Section 1613.235 which established the procedures for requesting reopening and reconsideration. In Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) this Court spoke to the issue of appropriate judicial role in reviewing administrative actions including rule making. In delivering the opinion of the Court Judge White states, "the Agency's action in promulgating such standards therefore may be set aside if found to be 'arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law,' 5 U.S.C. 706(2)(A)." The EEOC's interpretation of its regulations is and has always been that a request to reopen postpones the "finality" of a decision issued under 29 CFR 1613.234. The EEOC clarified and limited

that right when it promulgated 29 CFR 1613.234(b)(1) which provides:

> (b) Finality. A decision issued under this section is final within the meaning of Secs. 1613.281 and 1613.641 unless:
>
> (1) Within 30 days of receipt a decision issued under paragraph (a) of this section, either party files a timely request to reopen pursuant to Sec. 1613.235 . . . .

29 CFR 1613.234 when originally promulgated was the EEOC's equivalent to the Federal Court's Federal Rule of Civil Procedure (FRCP), Rule 60 which has no time limits. The EEOC's regulation on request to reopen was no more not in accordance with law than FRCP, Rule 60 is not in accordance with law. Neither was the EEOC's regulation arbitrary or capricious just as FRCP, Rule 60 is not arbitrary or capricious. Based on such decisions by some circuits such as the Fourth Circuit in Clark v. Goode, 499 F.2d 130 (4th Cir. 1974) and Birch v. Lehman, 677 F.2d 1006 (4th Cir. 1982) and in the Ninth Circuit in Mahroom v. Defense

Language Institute, 732 F.2d 1439 (9th Cir. 1984) the EEOC finally clarified and limited the right to request to reopen when 29 CFR 1613.234(b) was adopted on October 30, 1987. The original legislative (substantive) right to request reopening or reconsideration at any time (similar to FRCP, Rule 60) promulgated at 29 CFR 1613.235 in Federal Register (FR) 32540, September 1974 was limited by the promulgation of 29 CFR 1613.234(b) in FR 41920, October 20, 1987, effective November 20, 1987 to request reopening or reconsideration within 30-days. This Court in Vermont Yankee Nuclear Power Corp. v. National Resource Defense Council, Inc. 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) states in part, "... we ... caution reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress ...." In Birch the Fourth Circuit engrafted its own notion of when the EEOC's "final action" occurs rather than deferring to

the EEOC's determination as to what constitutes their "final action" for the purposes of providing right-to-sue notices.

Since the EEOC has resolved the concerns of the Fourth Circuit in Clark and in Birch and the Ninth Circuit in Mahroom that no decision by the EEOC could be regarded with certainty as 'final action' and that such would render the statutory 30-day requirement of 42 USC 2000e-16(c) meaningless, these concerns are no longer legitimate basis for review of a request for reopening or reconsideration. The promulgation of 29 CFR 1613.234(b) moves the focus of a request to reopen or reconsider to whether or not the request was made within the 30-day allowable times.

The key here is that the promulgation of 29 CFR 1613.234(b) does not create a new legislative (substantive) right to request to reopen; it limited the already existing right that had existed since the promulgation of 29 CFR 1613.235 in September 1974. Since the plaintiff made both his requests to reopen

within the 30-day time limit [29 CFR 1613.234(b)], "finality" did not occur until the receipt of the May 6, 1988 denial of request to reopen which was received on May 19, 1988. The extent of the misapplication of 29 CFR 1613.234(b) by the lower Court is best illustrated by the U.S. District Court, Eastern District of North Carolina, New Bern Division's dismissal of Woods v. Ball, No. 88-142-CIV-4, June 1, 1989 where the case was dismissed on the Birch precedent when Woods received his decision from EEOC on October 8, 1988 after the November 20, 1987 effective date of 29 CFR1613.234(b), and then timely requested to reopen, which was denied. In dismissing the case the District Court wrote, "[T]he fact that plaintiff had sought reconsideration of the decision unsuccessfully does not alter the status of the October 8, 1988 date as being the date of final agency action." 29 CFR 1613.234(b) does not require that the request to reopen be granted to stay the "finality" of

the EEOC's decision. In Woods the lower Court's decision is clearly contrary to the regulation [29 CFR 1613.234(b)].

The Congressional intent of Title VII (the Civil Rights Act) was to create a lay process for processing Equal Employment Opportunity complaints. On its face the statutory process is not complex. However, through regulations, a process has been designed which has proven the undoing of many a complainant, contrary to Congressional intent. This has occurred whether or not the complainants were represented by legal counsel. It is contrary to Congressional intent to construe regulations contrary to their clear wording in such a manner that it forecloses a substantive right. It is inherently unfair for the EEOC/Civil Service Commission to promulgate regulations which are challenged by the courts as 29 CFR 1613.235 was challenged in Clark and Birch as early as 1974 then not act to clarify that challenge to the regulation until October 30, 1987 thereby causing complainants to

unknowingly jeopardize their right-to-sue in court by relying on the plain wording of the regulation.

Other court decisions further compounded the process. For instance, the courts including the Fourth Circuit have been rather consistent in their rulings that petitioners must exhaust all administrative remedies before filing in court. Where a complainant has further rights of appeal, reopen, reconsideration, etc. and he fails to do so, he fails to exhaust his administrative remedies, see Gaballah v. Johnson, 629 F,2d 1191, (C.A.Ill 1980). Also Federal employees have been required to exhaust administrative remedies before suing in district courts, see Ettinger v. Johnson, 518 F.2d 648, (C.A.Pa 1975) on remand 410 F.Supp. 519; Arrington v. Ballar, 481 F.Supp. 50, (D.C.Tex 1979); I.M.A.G.E.(Inc. Mexican-Am Government Emp.) v. Equal Employment Opportunity Commission, 400 F.Supp. 1034, (D.C.Colo 1979).

The EEOC procedures set out in 29 CFR Part 1613 has several stages where the complainant is provided a right-to-sue notice. Examples are found at 29 CFR 1613.217 and 29 CFR 1613.221 and 29 CFR 1613.234. The EEOC demonstrated its interpretation of a right-to-sue after the request to reopen by the issuance of a new right-to-sue notice. There exists no conflict between the EEOC's interpretation of their reply to a request to reopen as a "final action" and the term "final action" in 42 USC 2000e-16(c). Therefore, no conflict in law. The issue that should have been addressed in Birch is what constitutes the "final action" by the EEOC and who's interpretation of that issue prevails. It is clear that the EEOC's interpretation must prevail as Congress has expressed no specific intentions to deny complainants the right to reopen prior to filing a civil suit and the EEOC's interpretation that a right-to-sue exist after the EEOC's action on a request to reopen is a reasonable construction of the term "final

action", see Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.. 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984).

As a minimum the petitioner should be entitled to "equitable tolling" based on the EEOC's interpretation that a right-to-sue exist after a request to reopen and the petitioner relied on that interpretation when deciding to request to reopen. Further complications and support for "equitable tolling" arise from the situation where once the petitioner requested to reopen he was barred from filing civil suit until atleast 180-days or after the EEOC acted on the request to reopen because of the requirement held by many courts including the Fourth Circuit that administrative remedies must be exhausted before filing civil actions. Plainly stated, once the petitioner made his request to reopen during the 30-days following receipt of the Office of Review and Appeals (ORA) of the EEOC, which was a rebuttable presumption of untimeliness dated September 25,

1985, the petitioner was barred by the requirement of exhaustion of administrative remedies from filing in court until the EEOC failed to render a reply in 180-days or after the reply to the request to reopen. In short, once the request to reopen was filed, civil action within that 30 day time period was barred. As for the conflict of availability of "equitable tolling" which existed between the Fourth, Fifth, Seventh, and Ninth Circuits "against" and the Sixth, Tenth, Eleventh, and the District of Columbia Circuits "for", this Court settled the issue recently on December 3, 1990 in Irwin v. Veterans Administration, LEXUS 6120; 59 U.S.L.W. 4021 (1990). If plaintiff had been in a "for" circuit his case would not have been dismissed without consideration of "equitable tolling" see Donaldson v. Tennessee Valley Authority, 759 F.2d 535 (6th Cir. 1985).

On the issue of the existence of a genuine issue of material fact, the petitioner refers this Court to the quote from the sworn

affidavit of R. W. Wilkerson, Jr. on page 9 of this petition which asserts that the position was not a Federal position. This issue has not been resolved. Since the regulations 29 CFR 1613.28(b) and (e) for private sector and 29 CFR 1613.234 for Federal sector require different right-to-sue notices and the USDA insist that the position is not a Federal sector position which would preclude the action from coverage by the regulation used to dismiss the case, it must be at least remanded for resolution of that genuine issue of material fact. The plaintiff intentionally filed under both 42 USC 2000e-16(c) and 29 USC 791, 793 and 794 specifically because of the unresolved issue of whether or not the position is a private sector position or a Federal position. Filing under the two different authorities was to establish jurisdiction whether the position was determined to be Federal or non-Federal.

The petitioner also filed suit under 5 USC 3309 and 38 USC 2011 for admitted violations of

the Veterans Preference Regulations (see excerpt from R. W. Wilkerson, Jr. sworn affidavit on page 9 for this admission) which have not been addressed by the lower Courts. The lower Courts should have granted the relief sought based on the admitted violation of the Veterans Preference Regulations by Wilkerson and the lower Court's assumptions that it was a Federal position. If the assumption is sufficient to dismiss one charge it is sufficient to grant relief on the other admitted charge. Federal Rules of Civil Procedure, Rule 54(b) requires that at a minimum that the lower Courts must make an expressed determination that there is no just reason for delay with respect to the Veterans Preference claims and the claim of Nepotism filed under 28 USC 1331. While paragraph I of the District Court's Order acknowledges that "... employment preference based on his status as a veteran ...." was an issue, the Order contains no reference to any disposition of that issue. However, the Court ruled that the

defendant's "... motion for summary judgement is granted and this action is dismissed." The Order was accompanied by the Judgment in a civil action dismissing the action leaving petitioner no option except appeal to the Fourth Circuit even though all the multiple claims had not been adjudicated. The Fourth Circuit affirmed rather than remanding the case for proper disposition of all the multiple claims.

CONCLUSION

Based on the above analysis the following are proper and reasonable conclusions:

The EEOC's interpretations of its own regulations are entitled to due deference. The EEOC's interpretations of when a right-to-sue notice is appropriate must prevail. The EEOC's reply to the request to reopen was the EEOC's "final action". The petitioner timely filed

his case in the District Court based on the EEOC's interpretation as what constituted its (EEOC's) "final Action".

The 30-day time limit in 42 USC 2000e-16(c) is subject to "equitable tolling". Even if petitioner failed to timely file in District Court after receipt of the September 25, 1985 rebuttable presumption of untimeliness from the EEOC, he would be entitled to "equitable tolling" based on reliance on the EEOC's interpretation of what constitutes the EEOC's "final Action" and when a right-to-sue exists and/or EEOC's failure to timely clarify this issue by timely promulgating 29 CFR 1613.234(b). "Equitable tolling' is also appropriate because the petitioner was barred from filing in district court once he filed his request to reopen.

The petitioner is entitled to the benefit of 29 CFR 1613.234(b) because the right to reopen already existed and was merely limited

by the clarification. Since the petitioner met the requirements of the original regulation and also meets the requirements of the clarification of 29 CFR 1613.234 because he requested to reopen within the 30-day allowable time limits, the petitioner is not excluded by the limitations mandated in the clarification of 29 CFR 1613.234 by adding 29 CFR 1613.234(b). The petitioner is entitled to the broader original right to request to reopen because his request proceeded the effective date of the limitations of the right.

It is evident that a genuine issue of material fact exist on whether the position is or is not a Federal position. The District Court erred in granting the defendant relief by summary judgement as a matter of law and the Circuit Court erred in affirming.. The District Court erred in dismissing the complete action on less that all the issues and the Circuit Court erred in affirming.

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals and the District Court in this matter.[1/]

DATED: January 19, 1991

Respectfully Submitted,

Truman E. Bullard

TRUMAN E. BULLARD, Pro Se

1/ If this Court elects not to address the issues presented in this writ at this time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinion in Irwin, supra.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 88-67-CIV-3

TRUMAN E. BULLARD,	)	
	)	
Plaintiff	)	
	)	
v.	)	O R D E R
	)	
RICHARD E. LYNG,	)	
	)	
Defendant	)	

I

On 17 June 1988 plaintiff instituted this action seeking redress under the Rehabilitative Act of 1973, 29 U.S.C. Section 791, for alleged intentional discrimination in the refusal of the United States Department of Agriculture (USDA) to grant him an employment preference based on his status as a veteran and a handicapped person. The matter is now before the court on a motion by defendant to dismiss or, in the alternative, for summary judgement. Briefs have been filed and a decision is appropriate.

II

Before addressing the motion on its merits the court notes that plaintiff filed a document on 16 June 1989 entitled "Plaintiff's Reply Memorandum" which defendant has now moved to strike as being in violation of the local rules of this court. With its motion defendant filed a supporting memorandum. In apt time plaintiff filed a memorandum in response. Thereafter, defendant filed a reply brief. All of this is permitted by Local Rule 4.00 of this court. Neither Rule 4.00 nor any other rule of this court or the Rules of Civil Procedure permit the filing of further briefs. In fact, Rule 4.06, which permits reply briefs, provides that "[r]eplies to responses are discouraged. However, a party desiring to reply to matters raised initially in a response to a motion ... shall file the reply within ten days ...." Were the court to permit each party to reply to the last brief of the other the process would never end. Thus, only those briefs explicitly

permitted by the rules will be allowed. The motion by defendant to strike plaintiff's reply memorandum is allowed and the same will not be considered by the court.

III

The following facts are not in dispute:

1. On 22 July 1977 plaintiff applied for a position in the County Executive Director Training Program with the Agriculture Stabilization and Conservation Service (ASCS), USDA.

2. Plaintiff interviewed for the position in October 1977.

3. On 11 November 1977 six applicants, other than plaintiff, were selected.

4. On 8 January 1978 five more applicants, again excluding plaintiff, were selected.

5. On 23 January 1979 plaintiff contacted an EEOC Counselor and complained that he had been discriminated against on the basis

of his handicap.

6. On 23 February 1979 plaintiff had his final interview with the EEOC counselor.

7. On 1 March 1979 plaintiff filed a complaint with the USDA.

8. A final agency decision, finding no discrimination in plaintiff's failure to be selected, was rendered on 2 February 1984.

9. On 28 February 1984 plaintiff appealed to the Office of Review and Appeals of the EEOC.

10. On 25 September 1985 plaintiff's appeal was dismissed because it had not been timely filed. At the time he was notified of the dismissal of his complaint, plaintiff was provided with a document entitled "STATEMENT OF APPELLANT'S RIGHTS" which advised him, among other things, of his right to file an action in court.[1]

---

[1] The form stated, in part, "[y]ou are hereby notified that the attached decision in your case is final. You have the right to file a civil action in the appropriate United States

The rights form also advised plaintiff that he could request that the decision be reopened. However, it also contained the following warning: "FILING A REQUEST TO REOPEN ... MAY NOT EXTEND THE TIME PERIOD ALLOWED FOR FILING A CIVIL ACTION. IF YOU WISH TO PRESERVE YOUR RIGHT TO FILE A CIVIL ACTION, THE CIVIL ACTION SHOULD BE FILED WITHIN THE TIME ALLOWED, EVEN IF YOU DECIDE TO REQUEST REOPENING ...."

11. On 8 October 1985 plaintiff requested that his appeal be reopened.

12. On 28 July 1987 plaintiff's request to reopen his appeal was allowed. The matter was considered on the merits and no discrimination found.[2]

13. On 28 August 1987 plaintiff again requested that his case be reopened.

14. On 6 May 1988 the request to

District Court "WITHIN THIRTY (30) DAYS from the date you receive this decision." (emphasis in original)

[2] The notification of this decision also included one of the advise-of-rights forms.

reopen was denied and plaintiff was again provided with the form advising him of his rights.

IV

Defendant contends that this action should be dismissed because plaintiff failed to exhaust his administrative remedies and because the action was not timely filed. The court agrees that the action must be dismissed for failure to timely file. Thus, defendant's alternative argument will not be addressed.

Title 29, United States Code, Section 794a adopts the remedies of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-16) as the appropriate procedure for an action under the Rehabilitation Act. Title 42, United States Code, Section 2000e-16 provides that an aggrieved party must file a civil action within thirty days of receipt of notice of final action taken by the agency or department or by the EEOC upon an appeal from a department or

agency action.

Birch v. Lehman, 677 F.2d 1006 (4th Cir. 1982), cert. denied, 459 U.S. 1103 (1983), was strikingly similar to the case at bar and its decision is controlling here. In Birch, plaintiff was dismissed from her position as a librarian at the Navy Regional Medical Center (NRMC) at Camp Lejeune, North Carolina. Plaintiff had filed an administrative complaint prior to her dismissal in which she alleged that she was denied benefits because of her sex. On 23 April 1979 Birch was informed that several of the issues which she raised would be given further consideration but that some of her claims, including her dismissal, were rejected. The notification also advised plaintiff that the decision of the NRMC with regard to the rejected issues was final and that she could appeal that decision to the EEOC within fifteen days of the district court within thirty days. She was also informed that she could appeal to the EEOC after which she

could institute an action in the district court within thirty days of the EEOC decision. Birch did appeal to the EEOC which notified her of its final decision on 23 October 1980. This notification advised plaintiff that she had thirty days after receipt of the notice to file a civil action. And, as in the case at bar, plaintiff was also notified that she could request the EEOC to reopen her case. She made such a request on 20 November 1980 and it was rejected on 18 May 1981. She then commenced her civil action on 17 June 1981.

The decision of the district court that the "final action" triggering the running of the 30-day filing period was the initial denial of the claim by the EEOC was affirmed by the Fourth Circuit. There, as here, the request for reconsideration did not act to toll the time-filing requirement. To a contention by Birch that there was no "final action" by the EEOC until she was notified of the denial of her request for reopening, the Fourth Circuit said: "Accepting appellant's position would

mean that no decision by the EEOC could be regarded with certainty as a 'final action' since a plaintiff could revive his claim at any time, merely by requesting reconsideration. Such a result would render the statutory 30-day requirement meaningless." See, Mahroom v. Defense Language Institute, 732 F.2d 1439 (9th Cir. 1984), and Clark v. Goode, 499 F.2d 130 (4th Cir. 1974).

Plaintiff having been notified on 25 September 1985 that he must file his civil action within thirty days from the date he received the notice, his filing of this action on 17 June 1988, nearly three years later, was clearly untimely.

V

Plaintiff contends that he is protected by 29 C.F.R. Section 1613.234(b)(1) which provides:

> (b) Finality. A decision issued under this section is final within the meaning of Secs. 1613.281 and 1613.641 unless:

> (1) Within 30 days of receipt a decision issued under paragraph (a) of this section, either party files a timely request to reopen pursuant to Sec. 1613.235 ....

Of course, this regulation offers no help to plaintiff as it was adopted on 30 October 1987, more than two years after plaintiff's final EEOC decision was rendered.

Defendant's motion for summary judgement is granted and this action is dismissed.

This 10 July 1989.

original signed
W. EARL BRITT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2787

TRUMAN E. BULLARD

Plaintiff -Appellant

versus

CLAYTON YEUTTER, SECRETARY, U. S. DEPARTMENT OF AGRICULTURE

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. W. Earl Britt, Chief District Judge. (CA-88-67-CIV)

Submitted: August 27, 1990
Decided: September 28, 1990

Before SPROUSE and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Truman E. Bullard, Appellant Pro Se. Stephen Aubrey West, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Truman E. Bullard appeals from the district court's order granting defendant's motion for summary judgment in this civil action. Our review of the record and the district court's opinion disclosed that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Bullard v. Yeutter, CA-88-67-CIV (E.D.N.C. July 11, 1989). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decision process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 22, 1990

No. 89-2787

TRUMAN E. BULLARD

Plaintiff - Appellant

v.

CLAYTON YEUTTER, SECRETARY, U. S. DEPARTMENT OF AGRICULTURE

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition fro rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

original stamped
JOHN M. GREACEN
CLERK

OPPOS

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(2)

No. 90-1272

Supreme Court, U.S.
FILED
APR 22 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

TRUMAN E. BULLARD, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, under former regulations of the Equal Employment Opportunity Commission (EEOC) that allowed multiple requests for reopening of EEOC decision and that prescribed no deadline for such requests, the 30-day time period under 42 U.S.C. 2000e-16(c) for seeking judicial review commenced upon the EEOC's issuance of an initial decision that the agency viewed as final.

2. Whether petitioner's time for seeking judicial review was equitably tolled in light of the EEOC's adoption of a revised regulation, more than a year after the EEOC's initial decision in this case, that renders an initial EEOC decision nonfinal upon the receipt of a timely request to reopen.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1272

TRUMAN E. BULLARD, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. B1-B2, is not yet reported. The opinion of the district court, Pet. App. A1-A10, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1990. A petition for rehearing was denied on October 22, 1990. Pet. App. C1-C2. The petition for a writ of certiorari was filed on January 22, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner unsuccessfully applied for a position in the County Executive Director Training Program with the Agriculture Stabilization and Conservation Service of the Department of Agriculture. After consulting an Equal Employment Opportunity Commission (EEOC) counselor, petitioner filed a complaint with the Department of Agriculture alleging discrimination based on his status as a veteran and a handicapped person. On February 2, 1984, the agency rendered a final decision finding no discrimination against petitioner in his failure to be selected. On February 28, 1984, petitioner filed an appeal with the EEOC's Office of Review and Appeals. On September 25, 1985, the EEOC dismissed the appeal because it had not been timely filed. Pet. App. A1, A3-A4.

In notifying petitioner of the dismissal of his appeal, the EEOC included a document captioned "STATEMENT OF APPELLANT'S RIGHTS," advising petitioner that "[y]ou are hereby notified that the attached decision in your case is final. You have the right to file a civil action in the appropriate United States District Court *WITHIN THIRTY (30) DAYS* from the date you receive this decision." The notice also informed petitioner that he could seek reopening, but it warned that "FILING A REQUEST TO REOPEN * * * MAY NOT EXTEND THE TIME PERIOD ALLOWED FOR FILING A CIVIL ACTION. IF YOU WISH TO PRESERVE YOUR RIGHT TO FILE A CIVIL ACTION, THE CIVIL ACTION SHOULD BE FILED WITHIN THE TIME ALLOWED, EVEN IF YOU DECIDE TO REQUEST REOPENING * * *." Pet. App. A4-A5 & n.1.

On October 8, 1985, petitioner sought reopening. On July 28, 1987, the EEOC allowed his request to reopen the administrative appeal, considered his case on the merits, and found no discrimination. On August 28, 1987, petitioner again requested reopening, and on May 6, 1988, the EEOC denied his request. The notice of each of those administrative actions contained the previously described form advising petitioner of his right to file a civil action, or request reopening. Pet. App. A5-A6 & n.2.

2. On June 17, 1988, petitioner filed an action in the United States District Court for the Eastern District of North Carolina, challenging the EEOC's decision under the Rehabilitation Act of 1973, 29 U.S.C. 791. The district court dismissed petitioner's case on the ground that it was not timely filed. Pet. App. A6. The court noted that under 29 U.S.C. 794a, the remedies and procedures of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, applied to petitioner. Consequently, as in a Title VII case, a Rehabilitation Act plaintiff must file a civil action within 30 days of receipt of notice of final agency action. 42 U.S.C. 2000e-16(c) (authorizing suit "[w]ithin thirty days of receipt of notice of final action taken by a department, agency, or unit * * * or by the [EEOC] upon an appeal from a decision or order of such department, agency or unit * * *").

Here, the court found, petitioner failed to meet the timeliness requirement for seeking judicial review because he had received a final agency decision more than 30 days before filing suit. Pet. App. A6-A9. In finding that petitioner's requests to reopen did not toll his time for seeking judicial review, the court relied on *Birch* v. *Lehman*, 677 F.2d 1006 (1982), cert. denied, 459 U.S. 1103 (1983), where the Fourth Circuit had rejected the contention that "there was

no 'final action' by the EEOC until [the plaintiff] was notified of the denial of her request for reopening." *Id.* at 1007. The court explained in *Birch* that that position "would mean that no decision by the EEOC could be regarded with certainty as a 'final action' since a plaintiff could revive his claim at any time, merely by requesting reconsideration"—a result, the court stated, that "would render the statutory 30-day requirement meaningless." *Id.* at 1008. Applying *Birch*, the district court determined that because petitioner received a decision rejecting his claim on September 25, 1985, and had been notified that he had to file his civil action within 30 days of receiving that notice, "his filing of this action on 17 June 1988, nearly three years later, was clearly untimely." Pet. App. A9.

The court then turned to petitioner's contention that he was entitled to the benefit of a revised EEOC regulation, 29 C.F.R. 1613.234(b)(1), under which an EEOC decision is final "unless: (1) Within 30 days of receipt of a decision * * *, either party files a timely request to reopen * * *." Pet. App. A9-A10. The court held that this regulation did not aid petitioner because "it was adopted * * * more than two years after [petitioner's] final EEOC decision was rendered." Pet. App. A10.

3. The court of appeals affirmed in an unpublished opinion "on the reasoning of the district court." Pet. App. B2.[1]

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[1] The per curiam affirmance noted that "[u]npublished opinions are not binding precedent" under the Fourth Circuit's internal rules. Pet. App. B1.

ARGUMENT

1. Petitioner contends (Pet. 12-19, 24) that the rejection of his discrimination claim was not final for purposes of judicial review until the EEOC had denied his request to reopen the agency's initial decision. Although the courts of appeals were divided over whether a request for reopening tolled the time for seeking judicial review under the EEOC's former regulations,[2] that issue does not warrant review here.

Whatever the merits of the tolling issue under the EEOC's former regulation, that issue is of no continuing importance because the EEOC regulation in force at the time of petitioner's case long since has been replaced. Under the current regulation, 29 C.F.R. 1613.234(b)(1), an EEOC decision is made final *unless* a party files a timely request for reopening in accordance with the agency's regulations. As a result, it is now clear that parties may seek reopening at the agency level without impairing their ability to seek judicial review within the statutory time limits. The time limits for seeking judicial review run from "final" decisions, and a timely petition for reopening "tolls the period for judicial review of the original order, which can therefore be appealed to the courts *directly* after the petition for reconsidera-

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[2] Compare *Birch* and *Mahroom* v. *Defense Language Institute*, 732 F.2d 1439 (9th Cir. 1984) (rejecting tolling) with *Donaldson* v. *Tennessee Valley Authority*, 759 F.2d 535, 538 (6th Cir. 1985); *Nordell* v. *Heckler*, 749 F.2d 47, 49-50 (D.C. Cir. 1984); and *Martinez* v. *Orr*, 738 F.2d 1107, 1112 (10th Cir. 1984) (all holding that despite the Commission's allowance of multiple petitions for reopening, denial of a request to reopen would be a "final agency action" if the request were filed within 30 days of the EEOC's initial decision).

tion is denied." *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 279 (1987). There is no conflict in the circuits regarding the tolling issue under the EEOC's new regulation.[3]

2. Petitioner also contends (Pet. 20-22, 25) that his complaint was timely upon application of the doctrine of equitable tolling. This Court's decision in *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990), establishes that equitable tolling applies to the 30-day period at issue here, but petitioner's case presents no situation warranting relief under that doctrine.

"[T]he principles of equitable tolling * * * do not extend to what is at best a garden variety claim of excusable neglect," *Irwin*, 111 S. Ct. at 458, and petitioner presents nothing more. The law in the Fourth Circuit that a motion to reopen did not toll the timeliness of a complaint under 42 U.S.C. 2000e-16(c) was well established when petitioner chose to delay in filing his action; petitioner was not justified in disregarding that law, particularly when the EEOC's notice-of-rights form specifically warned him that a suit had to be filed within 30 days and that a request to reopen "may not extend the time period allowed for filing a civil action." Pet. App. A4. Nor does the promulgation of the EEOC's present regulation aid petitioner; as the district court pointed out, the cur-

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[3] In a submission to the Fourth Circuit in *Scott* v. *Stone, Secretary of the Army*, No. 91-1407, the government has urged the court to hold that "in cases in which a motion for reconsideration was filed pursuant to the Commission's new regulations, the Commission's 'final action' which triggers the 30-day period is the denial of reconsideration." Gov't Br. 5 (filed Mar. 27, 1991). See also *Ganheart* v. *Lujan*, 733 F. Supp. 1053, 1057-1058 (E.D. La. 1990), distinguishing *Birch* based on the EEOC's new rules.

rent EEOC regulation "was adopted on 30 October, 1987, more than two years after [petitioner's] final EEOC decision was rendered." Pet. App. A10.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STUART M. GERSON
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ROBERT D. KAMENSHINE
Attorneys

APRIL 1991

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[4] Petitioner claims that the district court did not dispose of his veterans preference claim (Pet. 22-23), but the court's opinion initially noted that petitioner sought redress under the Rehabilitation Act and "alleged intentional discrimination in the refusal of the United States Department of Agriculture (USDA) to grant him an employment preference based on his status as a veteran and a handicapped person." Pet. App. A1. Because this case did not involve an independent claim of a denial of a veteran's preference, which claim would not have been pursued through the EEOC in any event, the court properly treated the veteran's preference claim simply as an aspect of prohibited handicap discrimination.

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